JUDGES OF THE HIGH COURT.

CHIEF JUSTICE.

THE HON'BLE SIR JOHN EDGE, *Kt.*

PUISNE JUDGES.

„ G. E. KNOX.

„ H. F. BLAIR.

„ P. C. BANERJI.

„ W. R. BURKITT.

„ R. S. AIKMAN ... (*Offg.*)

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PRIVY COUNCIL.

FULL BENCH.

APPELLATE CIVIL.

REVISIONAL CIVIL.

APPELLATE CRIMINAL.

REVISIONAL CRIMINAL.

EXTRAORDINARY ORIGINAL CIVIL.

REFERENCE.

THE
INDIAN LAW REPORTS,
Allahabad Series.

PRIVY COUNCIL.

P C
1894,
June 15th and 19th, July 14th

DEO KUAR (PLAINTIFF) *v* MAN KUAR (DEFENDANT).

[On appeal from the High Court at Allahabad]

Voluntary transfer alleged to have been made by a Hindu widow—Burden of proving her knowledge of her rights—Construction of the Pensions Act (Act No. XXIII of 1831), sections 3 and 4—Certificate to precede suit for malikana payable by Government

WHERE a voluntary transfer by a Hindu widow is alleged, the burden of proving that it was a free gift, made with knowledge by her of her rights, is on the donee

The plaintiff, widow of the only son who survived his father, who was the owner of village lands and other property, had become on her husband's death without issue entitled, as his widow, to the estate which he had inherited But she obtained possession of only half of it The other half was in the recorded possession, when this suit was brought, of the widow of her late husband's younger brother, who died in his father's lifetime

The case which the latter widow, as defendant, now sought to make, was that she had become entitled to a share in the estate as the result of a series of transactions, by way of family arrangement, in which the two widows, and their mother-in-law, widow of the deceased father, had taken part These included a reference to arbitration, a release, and dakhil kharij in settlement records *Held*, that the plaintiff must succeed, in the absence of proof, of which the burden was on the defendant, that the plaintiff, when ceding half of the estate to which she was entitled, had knowledge of her right, as widow, to the whole, and had freely made what in effect was a gift

A village, part of the estate, had been made over to the Government by the parties, who in consideration received a malikana in perpetuity, or, in other words, a grant of a portion of the revenue in lieu of their proprietary right *Held*, that the

Present LORDS HOBHOUSE, MACNAGHTEN AND MORRIS, AND SIR R. COUCH.

1894

UDEO KUAR v. MAN KUAR.

right to the malikana was on the construction of sections 3 and 4 of the Pension Act, XXIII of 1871, in the absence of a certificate obtained under that Act, excluded from judicial cognizance in this suit *Vasudev Sadashiv Modak* v. *The Collector of Ratnagiri* (1), and *Maharaval Mohan Singji Jeysingji* v. *The Government of Bombay* (2), referred to and approved.

APPEAL from a decree (25th June 1889) of the High Court, reversing a decree (29th March 1888) of the Subordinate Judge of Bánda.

The plaintiff-appellant and the defendant-respondent were the widows of two Hindu brothers, under the Mitakshara. The father of the brothers, Pransukh Ram, a Gujrati Bania, originally of the [illegible] State came thence to Bánda in the North-Western Provinces, where he lived till his death in February 1868. His son, Ganga Ram, the younger of the brothers and husband of the present defendant, died in 1863, before his father. The elder brother, Uttam Ram, the husband of the plaintiff, survived his father, and having inherited his shares in zamíndári villages in the Bánda and Hamirpur districts, land in the town of Bánda, and other family property, the subject of the present claim, died on the 30th October 1875.

The principal question raised on this appeal was whether the plaintiff, upon whom the inheritance had devolved, had entered, with knowledge of her rights, into a series of transactions after her husband's death, ceding to the defendant as a free gift possession of a moiety of the estate to which she herself had become exclusively entitled during her life. These transactions began when, after the death of Uttam Ram, his mother Jarao applied on the 20th December 1875, to have her, Jarao's, name entered as that of the malguzar of mauza Jeorahi, pargana Bánda, in substitution for the name of her deceased son in the settlement record. Her name was so recorded; and also the malguzari of other villages, belonging to the estate, was entered in her name, as well as in that of the plaintiff; and of some villages all the three widows obtained dakhil kharij in their names. The facts relating to the assent of the

(1) L. R., 4 I. A. 119; I. L. R., 2 Bom., 99

(2) L. R., 8 I. A. 77, I. L. R., 5 Bom., 408.

plaintiff to the first of these entries in the settlement record, when she was in Baroda, where she remained till 1877, as well as all the matters material to this suit, are stated in their Lordships' judgment.

In June 1876 the defendant left Baroda for Bánda, and the plaintiff followed her in 1877. They lived with Jarao in Bánda till the death of the latter on the 30th November 1877. Before she died, two persons gave what purported to be an award between the three widows, dated 9th October 1877. They apportioned one village of the family estate to Jarao for life, dividing the rest of the property in Bánda and Hamírpur between the two other widows in equal shares. There was evidence that a partition among the widows made of family property at Barnagar in Baroda in 1878, was followed by the execution of fárkhattis, or releases, supporting the above division.

Mauza Pachanahi, one of the villages as to which a joint possession by the widows was recorded, was shared by them with one Durga Prasad, who held half of it. By an agreement of the 10th September 1880, this village was made over to the Government on their making a malikana allowance to the former owners of Rs. 2,000 a year. Of this Durga Prasad sold his half share to the widows, and the malikana was included in the present suit. The principal charges in the plaint (19th April 1886), which claimed possession and mesne profits, valuing the claim at Rs. 2,17,985, were that the entries in the record, whereby it had been the object of Jarao and Man Kuar to exclude the plaintiff from her right, had been effected during her absence and without her knowledge. Until Sambat 1940, corresponding to 1884, she had known nothing of the matter.

The defendant by her written statement asserted that by the custom prevailing in Gujrat, the birthplace of both parties, she was entitled as a gotraja sapinda to a share in the family property, though her husband had died in his father's lifetime; and she asserted that Uttam Ram's name had been recorded as that of the owner in possession of the whole zamíndári, not by right of exclusive inheritance, but because he was head of the family and held the

1894

DAO KHAN v. MAN KHAN

property in that character. On his death a dispute had arisen between the parties and Jarao Bai as to partition of the estate, and the widows had agreed to refer the question of their rights to arbitration. The arbitrators had on the 9th October 1877 made a joint award declaring the defendant entitled to a half share. Even if the defendant's title was defective, according to Hindu law, the award was conclusive and binding on all parties. The suit for malikana was not cognizable under the provisions of Act XXIII of 1871.

The issues raised questions as to the alleged custom, as to there having been an award, and as to its effect, if duly made, as to the partition alleged, and the release; and as to the application of Act No. XXIII of 1871 to the malikana allowance.

The Subordinate Judge, Pandit Ratan Lal, found no proof of the alleged custom. Whatever right the defendant might have could only be derived from the plaintiff, or from the award having made it over to her. On this point he found that the entries in the settlement record did not, in all cases, correspond with the assent alleged to have been given, nor yet with the division of the estate recommended in the so-called award. The latter was inoperative, as the submission of the parties had not been proved, they having, also, been absent, and the whole proceeding having been dictated by Jarao. When documents had been executed by parda women, proof had always been required that they had knowledge of the character and effect of the transaction; that they had some disinterested advice in the matter; and that they put their hands to the document or authorized its execution, understanding what they were about.

This proof being absent, the plaintiff was entitled to decree, but the malikana allowance could not be decreed, as it fell within the meaning of section 3 of Act No. XXIII of 1871, the Pensions Act, and no certificate had been obtained.

On appeal, the High Court (SIR J. EDGE, C. J., and BRODHURST, J.) reversed this judgment, and dismissed the suit.

Their view of the case rendered it unnecessary to consider the alleged custom. They decided in favor of the defendant as to the

fact that the plaintiff had ceded to her the half share, finding on the evidence that the defendant had obtained from the plaintiff, who well knew her own rights and who had the protection of her uncle Jia Ram, since deceased, when she was at Bánda in 1877, the property of which the defendant had been in possession for nine years before this suit was brought They were satisfied that the plaintiff, far from having made out a case of fraud or concealment, was acquainted from the first with what was being done, and that the arrangement was one that was carried out as an award made in accordance with the wishes of the three widows as to the settlement of their claims upon the estate They observed that there was nothing to prevent the plaintiff from giving evidence to show the fact that she was in 1877, and down to 1882, in ignorance of her legal rights, or of what was being done She was not strictly parda-nashin; she was not called either to show ignorance of law, if it could assist her, or ignorance of fact, if any existed. Nor was she called to show that she was ignorant of the acts of her own mukhtar, of the suit of 1878, which terminated in a decree against her and the present defendant In conclusion, they were satisfied that the plaintiff was an assenting party to the arrangement which finally resulted in the mutation of names and in the defendant's obtaining the property claimed

On this appeal Mr. *J. H. A Branson* and Mr. *W A. Raikes*, for the appellant, argued that the judgment of the High Court was erroneous. The *primâ facie* case which the plaintiff had brought forward had been sufficient to throw the burden of proof on to the defence to establish that a clear assent from her, with knowledge on her part of her rights, had been given to transactions dividing among three persons the estate to which she was exclusively entitled. Arrangements were said to have apportioned it to her brother-in-law's widow and to her mother-in-law. But no proof, and hardly any attempt at evidence, was on the record to show that what had been nothing less than a free gift had been made by the plaintiff with knowledge of her rights.

An alienation purporting to have been made by a Hindu widow, not shown to have had independent advice, made for no consider-

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1894

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